Supreme Court, U.S.
FILED

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No. _____

In the
Supreme Court of the United States
_____ Term, 1999-2000

ROBERT A. BROWN, et al,,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ruling of the Ninth Circuit Court of Appeals is in conflict with numerous statutes passed by Congress, prior rulings of this Court, and prior rulings of the Ninth Circuit and other circuit courts in holding that Petitioners can owe income taxes even though:

   a) No assessments for the funds at issue exist, and
   b) No court has ever ruled that Petitioners owed any income taxes for the year at issue?

2. Whether the Ruling of the Ninth Circuit Court of Appeals is in conflict with the apportionment provisions of the Constitution and the holding of this Court in *Pollock v. Farmers Loan & Trust*, 158 U.S. 601, and *Brushaber v. Union Pacific* RR, 240 U.S. 1 in holding that petitioners were required to pay a direct tax on their wages (as imposed in Code Section 3402(a)(1)) despite the fact that the such a direct tax was not imposed on the basis of apportionment and despite the fact that such funds were required to be refunded to petitioners pursuant to the provisions of 26 U.S.C 31(a)(1)?

3. Whether the Ruling of the Ninth Circuit Court of Appeals is in conflict with all of the taxing clauses of the Constitution and this Court's holdings in both *Pollock*, supra, and *Brushaber*, by permitting the United States to retain funds collected as a federal tax but which were not collected either on the basis of *apportionment* as provided for in Article 1, Sections 2 and 9, Clauses 3 and 4, nor on the basis of *geographic uniformity* as provided for in Article 1, Section 8, Clause 1 of the United States Constitu-

tion?

4. Whether the Ruling of the Ninth Circuit Court of Appeals is in conflict with this Court's holding in *Brushaber v. Union Pacific* RR, supra, by claiming in its ruling that "The Sixteenth Amendment authorizes a direct non-apportioned income tax on resident United States citizens."?

5. Whether the Ruling of the Ninth Circuit Court of Appeals is in conflict with Article 1, Section 1, Clause 1 of the United States Constitution and decisions of this Court in holding that federal courts and the petitioners are not bound by the "legislative powers" vested in Congress, but are only bound by such court decisions as the Ninth Circuit deems appropriate to select and cite?

6. Whether the Ruling of the Ninth Circuit Court of Appeals is in conflict with 26 U.S.C. 61 and the holding of this Court in *Brushaber v. Union Pacific* RR, supra and *Merchant's Loan & Trust Co. v. Smietanka,* 255 U.S. 509 in holding that "Compensation for labor services, paid in the form of wages or salary, is income subject to taxation."

7. Whether citizens of the United States have a right "to have the Assistance of Counsel" of their own choosing as guaranteed to them by the 6th Amendment, or are they now restricted by being allowed to have for such assistance only such "officers of the court" as are permitted by this Court?

PARTIES TO THE PROCEEDING

All parties are listed in the caption of this case. ROBERT A. BROWN and ELENA H. BROWN were Plaintiffs before the District Court, and Plaintiff/Appellants before the Court of Appeals. The UNITED STATES OF AMERICA was the Defendant before the District Court, and Defendant/Appellees before the Court of Appeals.

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With Respect to the Statutory Requirement for the Making of Assessments

26 U.S.C. 6201(a) provides in pertinent part: "The Secretary is authorized and required to make...**assessments** of all taxes... imposed by this title..." 3,8

26 U.S.C. 6203 provides in pertinent part that: "The **assessment** shall be made by recording the liability of the taxpayer in the office of the Secretary." 3,8

26 U.S.C 6213(c) provides in pertinent part: "If the taxpayer does not file a Petition with the Tax Court...the deficiency...shall be **assessed**..." 3

26 U.S.C. 6215(a) provides in pertinent part: "If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency... shall be **assessed**." 3

26 U.S.C 6303 provides in pertinent part: "...the Secretary shall,...within 60 days, after the making of an **assessment**...give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof." 3,8

26 U.S.C 6322 provides in pertinent part: "...the lien...shall arise at the time the **assessment** is made..." 3

26 U.S.C. 6501(a) provides in pertinent part: "...the amount of any tax imposed by this title shall be **assessed** within 3 years after the return was filed..." 3,8

26 U.S.C. 6501(c)(1) provides in pertinent part: "In the case of a false or fraudulent return with the intent to evade tax, the tax may be **assessed**, or a proceeding in court for collection...may be begun without assessment at any time." 3,15

26 U.S.C. 6665(a)(1) provides in pertinent part: "the additions to the tax, additional amounts, and penalties...shall be **assessed**...and paid in the same manner as taxes..." 3

26 U.S.C. 6671(a) provides in pertinent part: "The penalties and liabilities provided by this subchapter....shall...be **assessed** and collected in the same manner as taxes." 3

26 U.S.C. 6861(a) provides in pertinent part: "If the Secretary believes that the **assessment** or collection of a deficiency....will be jeopardized by delay, he shall...immediately...**assess** such deficiency...and notice and demand shall be made by the Secretary for the payment thereof." 3

26 U.S.C. 6863(a) provides in pertinent part:

" When an **assessment** has been made under section 6851, 6852, 6861 or 6862, the collection of the whole or any amount of such **assessment** may be stayed...Upon the filing of the bond the collection of so much of the amount **assessed** as is covered by the bond shall be stayed." 3

26 U.S.C. 7421(a) provides in pertinent part: "...no suit for the purpose of restraining the **assessment** or collection of any tax...whether or not or not such person is the person against whom such tax was **assessed**. (Emphasis added throughout).....3,8

With Respect to the Wage Tax Imposed in 26 U.S.C 3402

26 USC 1(a) provides in pertinent part: "There is hereby imposed on the taxable income..." 3,10,17

26 U.S.C. 31(a)(1) provides in pertinent part: **"In general.** The amount withheld as tax under chapter 24 shall be allowed to the recipient of the income as a credit against the tax imposed by this subtitle." 3,9

26 U.S.C. 3402(a)(1) provides in pertinent part: **"In general.** Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a tax..." 3,9,10

26 U.S.C 3402(d) provides in pertinent part: "If the employer...fails to deduct and withhold the tax under this chapter, and thereafter the tax against which such tax may be credited is paid..." 4,7,10

26 U.S.C 6413 (a)(1) provides in pertinent part: " If more than the correct amount of tax imposed by section...3402 is paid..." 10

Other Relevant Statutes

26 U.S.C. 61 provides in pertinent part: "...gross income means all income from whatever source derived..." 15,17,18,19

26 U.S.C. 871 provides in pertinent part: "...there is hereby imposed...a tax...received from...salaries, wages..." 19

26 U.S.C. 911(d)(2)(A) provides in pertinent part: "The term 'earned income' means wages, salaries, ...and other amounts received as compensation for personal services..." 19

26 U.S.C 6001 provides in pertinent part: " Every person liable for any tax imposed by this title...shall...comply with such rules and regulations as the Secretary may...prescribe." 6,14

26 U.S.C. 6011 provides in pertinent part: "When required by regulations proscribed by the Secretary any person made liable for any tax imposed by this title...shall..." 6,14

26 U.S.C. 6151 provides in pertinent part: "... when a return of tax is required...the person required...shall, without assessment, pay such tax..." 5,6,7

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CITATIONS OF OPINIONS AND ORDERS BELOW

The Ninth Circuit affirmed the District Court in 99-15308 in which the District Court in CV-98-00825-PMP granted the United States a summary judgment in denying Petitioners' suit for refund of the wage taxes (imposed in 26 U.S.C. 3402(a)(1)) they had paid. Both rulings have been included in the Appendix.

STATEMENT OF JURISDICTION

On October 26, 1999, the Ninth Circuit affirmed the District Court's granting of the summary judgment referred to above. On March 30, 2000, the Ninth Circuit denied Petitioners' Petition for Rehearing and for a Hearing *En Banc*. In addition the Ninth Circuit denied Petitioner's Motion for Publication of the Memorandum Disposition and also refused to "certify to the Supreme Court whether or not it has addressed the constitutional violations raised and set forth by Appellant/Petitioners in their appeal," as Petitioners requested in their "Supplement to Appellant/Petitioners' Petition for Rehearing etc. etc. etc." dated January 19, 2000 as shown in Petitioners' Appendix. Pursuant to 28 U.S.C. 1254(1), this Court has jurisdiction to review the Court of Appeals' Opinion and Decision on Writ of Certiorari.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES & REGULATIONS INVOLVED IN THE CASE

Article 1, Section 1, Clause 1 provides in pertinent part: "ALL legislative powers...shall be vested in a Congress of the United States."

Article 1, Section 2, Clause 3 provides in pertinent part: "Representative and direct taxes shall be apportioned among the several states..."

Article 1, Section 8, Clause 1 provides in pertinent part: "The Congress shall have power to lay and collect taxes, duties, imposts and excises...but all duties, imposts and excises shall be uniform throughout the United States."

Article 1, Section 9, Clause 4 provides: "No capitation, or other direct tax, shall be laid unless in proportion to the census or enumeration herein before directed to be taken."

The 6th Amendment provides in pertinent part for "the Assistance of counsel."

The 16th Amendment provides in pertinent part: "Congress shall have the power to lay and collect taxes on income...without apportionment..."

STATEMENT OF THE CASE

On or about April 14, 1997 Petitioners filed a 1996 income tax return showing no income taxes due and owing for that year and, therefore, requested a refund of the $5,035 in wage taxes (imposed pursuant to Code Section 3402(a)(1)) they had paid for 1996. When Petitioners filed their 1996 income tax return (claiming a tax refund) and when initiating this lawsuit, they had erroneously assumed that the funds at issue represented income taxes imposed in Section 1 of subtitle A of the Internal Revenue Code. However, after filing their claim for refund and the underlying lawsuit, they discovered that the funds at issue actually represented "*wage taxes*" imposed and collected pursuant to Code Section 3402(a)(1) of subtitle C. Since Petitioners believed that income taxes are based on "self-assessment," they initially sued for recovery of the taxes at issue based on their claim that no assessment existed (as required by such statutes as 26 U.S.C 6201, 6203, 6213, 6215, 6303, 6322, 6501(c)(1), 6665(a)(1), 6671(a), 6861(a), 6863(a), 7421(a) and Treasury Regulation 601.103 and numerous other statutes, and Treasury regulations) with respect to those funds. Therefore, there was no legal basis for the Government to retain the taxes it was then holding.

However, after discovering that the funds at issue were actually wage taxes imposed in Subtitle C, and not income taxes imposed in Subtitle A, Petitioners enlarged their claim to include recovery pursuant to 26 U.S.C. 31(a)(1) – which provides that those paying wage taxes can get a "credit" for such taxes against any income taxes due. Since Petitioners' 1996 income tax return showed they owed no income taxes for 1996 (and no court of competent jurisdiction had ruled otherwise) they were entitled to a cash refund for the amount of wage taxes paid – since this was the only

way they could receive the "credit" as provided for in both Code Sections 26 U.S.C 3402(d) and 26 U.S.C 31(a)(1).

Based on the Government's admission in its Answer to Petitioners' Complaint that no assessment existed with respect to the taxes at issue, Petitioners moved for summary judgment since, in the absence of any assessment or court determination that Petitioners owed any income taxes for 1996, they were entitled to a refund of the $5,035 at issue as a matter of law. Petitioners in subsequent pleadings to the trial court also supported their claim for refund with such authorities as *Bull v. U.S.*, 295 U.S., 247, wherein this Court held, on page 249, that:

> Once the tax is assessed, the taxpayer will *owe* the sovereign the amount when the date fixed by law for payment arrives.

Petitioners also cited *Rosenman v. U.S.*, 323 U.S. 658, 663, in which this Court pointed out that:

> ... money received when no assessment is then outstanding against the payment. The *receipt* by the Government of moneys under such an arrangement carries no more significance than would the giving of a surety bond. Money in these accounts is held not as taxes duly collected are held but as a deposit made in the nature of a cash bond for the payment of taxes thereafter found to be due.

Petitioners also cited U.S. *v. Marion Trust Co.*, 143 Fed Reporter, 301, 302 wherein the 7th Circuit correctly observed that: "An ad valorem tax [such as an income tax] is imposed only by assessment - an assessment being prerequisite to the existence of the tax." (Emphasis and bracketed material added)

To support their claim that absent an assessment (or court ruling as provided in 6501(c)(1)) the Government could have no legal claim to the funds at issue, Petitioners also cited excerpts from *G.M. Leasing v. United States*, 429 US 338 (1977) and excerpts from M. Saltzman's definitive work "IRS Practice and Procedure," Second Edition, wherein Saltzman states:

1) The assessment of a tax creates a debt...Once the assessment is made...the government, without judicial intervention, may summarily collect the assessment. (Paragraph 14.01[2])

2) An assessment is the official act of recording the liability of a taxpayer....and requires the signing of the assessment certificate by the assessment officer...(and) is the first step in the collection process. (Paragraph 14.05[1])

3) A taxpayer's liability is recorded by the official act of assessment. (Par.14.05[2])

In its Cross Motion for Summary Judgment, the Government ignored all of the statutes, court decisions and supporting references cited above and claimed it was entitled to a summary judgment which would allow it to keep the funds at issue *based on <u>two</u> authorities*: 26 U.S.C 6151 and Moran *v. U.S.* 63 F.3rd 663. Petitioners pointed out (See excerpts from Petitioners opening appeal brief appendix pages 50a-54a), that Section 6151:

a) had nothing to do with the payment of income taxes,
b) could only apply to the payment of certain excise taxes, and
c) in any case, Petitioners complied with this statute.

Petitioners pointed out to the trial court that:

> a) If Section 6151 were relevant to the payment of income taxes it would have been mentioned in the Privacy Act Notice contained in a 1040 booklet, but only Code Sections 6001, 6011, and 6012 are mentioned there as being relevant to the payment of income taxes.
>
> b) The Parallel Table of Authorities shows that the implementing regulation for Section 6151 is in 27 CFR, not 26 CFR.
>
> c) The regulation that actually appears in 26 CFR as allegedly related to Sect. 6151 (301.6151-1) is totally benign, and does not require taxpayers to do anything.
>
> d) Section 6151 presumably "requires" those making a return pay the amount shown on the return "without assessment or notice and demand," which is exactly what Petitioners did anyway. They "paid" the amount shown on their return (which was "zero") "without assessment or notice."

Based upon all of the above, it should have been apparent to the trial court that Section 6151 afforded the Government no basis for keeping the funds at issue, and that a single statute such as Section 6151 *could not have eliminated the need for assessments required by no less then 40 other statutes*.

In addition to all of the above, Petitioners even supplied the trial court with a certified copy of their "Certificate of Assessments and Payments" (Form 4340) in which the IRS acknowledged that Petitioners were entitled to a $5,035.57 credit.

Disregarding all of the above evidence that proved conclusively that Petitioners were entitled to a refund of the funds (wage taxes) at issue, the trial court awarded the Government a summary judgment. It did so on the basis that "The absence of a tax assessment by the Internal Revenue does not prove that a taxpayer owes no taxes," and based this surprising claim on two authorities – 26 U.S.C 6151 and *Moran v. U.S.*, 63 F.3d 663, 666 (7th Cir. 1995) – two authorities that Petitioners had already demonstrated were irrelevant and immaterial to the issue before the court. In handing down his ruling, District Court Judge Philip M. Pro:

> 1) totally ignored Petitioners' claim arising under Code Sections 3402(d) and 31(a)(1),
>
> 2) ignored all of the statutes listed on page 2-as well as approximately 20 other statutes that Petitioners did not bother to list, in favor of a statute that is clearly unrelated to either the payment of income taxes or the wage taxes at issue,
>
> 3) disregarded decisions of this Court in favor of a 7th Circuit decision that: a) was unrelated to both the law and the facts in this case, and b) also revealed that the income tax was being enforced ***neither*** on the basis of *apportionment* nor on the basis of *geographic uniformity* as required by the Constitution,
>
> 4) totally disregarded the existence of Petitioners' IRS Form 4340, which officially acknowledged that Petitioners were due a refund of the taxes at issue, and
>
> 5) totally ignored the observations of M. Saltzman regarding the legal significance of assessments.

Based on the trial court's decision, Petitioners appealed to the Ninth Circuit. Petitioners' Opening Brief, Reply Brief, and Motion for Reconsideration are included in the Appendix. In its unpublished decision, the Ninth Circuit sustained the trial court's decision. However, in doing so, the Ninth Circuit did not base its decision on any of the authorities relied upon by the trial court. It sustained the trial court's decision on the basis of three Appellate Court decisions (not mentioned in the trial court's decision) and without citing one statute. One wonders, therefore, why the U.S. Congress bothers enacting statutes.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's decision is in conflict with numerous statutes passed by Congress, prior rulings of this Court, and prior rulings of the Ninth Circuit and other circuit courts in holding that Petitioners could owe income taxes even though:

a) No assessments for such taxes existed, and
b) No court of competent jurisdiction had ever ruled that Petitioners owed any income taxes for the year at issue.

In claming that income taxes can be owed absent assessments the Ninth Circuit's decision is in conflict with such statutes as 26 U.S.C 6201, 6203, 6303, 6501(c)(1) and 7421[1] and all the other statutes enumerated on page 2 as well as such Supreme Court decisions as *Bull*, supra and *Roseman*, supra. Indeed Petitioners ask this Court to take judicial notice that in its decision, the Ninth Circuit does not cite one statute to support this claim or any claim con-

[1] If assessments are so unimportant that taxes can be owed without them, why did Congress pass a law (26 USC 7421) barring lawsuits "for the purpose of restraining ...assessment(s)"?

tained in its Ruling. Indeed the court's claim that "there is no requirement that the IRS make a formal assessment[2] of tax liability before payment is necessary" is not supported by reference to any statute. If assessments are not "required," why did Congress bother to provide for them? If the Government can, in this manner, ignore numerous laws calling for assessments, then the public itself must also be free to ignore laws passed by Congress. One wonders, therefore, who is actually bound by laws passed by Congress? It should also be noted that the 9th Circuit does not identify the statutes that establish the tax "liability" or the requirement for "payment" to which it refers. Apparently the 9th Circuit feels that its decisions need not be burdened either by laws that exist, or by "laws" that don't exist. Therefore, if the Supreme Court allows this decision to stand, it will have allowed, among other things, the 9th Circuit to stand America's entire legal system on its head.

II. In holding that Petitioners are required to pay a direct tax on their wages (as imposed in Code Section 3402(a)(1)) which was not imposed on the basis of apportionment, the Ninth Circuit's decision is in conflict with the apportionment provisions of the Constitution and the decisions of this Court in *Pollock v. Farmers Loan & Trust*, 158 U.S. 601, and *Brushaber v. Union Pacific RR*, 240 U.S. In addition its decision is also in conflict (by ignoring the issue altogether) with the provisions of 31(a)(1) which allow Petitioners to get a "credit" for any "wage taxes" paid.

Petitioners ask this Court to take judicial notice that the wage taxes at issue - as imposed in Code

[2] The statutes do not provide for "formal" assessments as opposed to "informal" ones. Obviously, the 9th Circuit sought by this contrivance to fashion some kind of credibility for its claim, when none exists.

Section 3402(a)(1) - have nothing to do with the 16th Amendment, or the income tax imposed in Section 1. The tax imposed in Code Section 3402(a)(1) – being a direct tax on wages - would obviously be unconstitutional if it were not made refundable *upon request* (as provided for in Code Section 31(a)(1)). Since the wage taxes at issue are not income taxes, they cannot claim the protection of the 16th. Amendment or the *Brushaber* decision. Since the wage tax is imposed directly on a "source" of income, it must be imposed pursuant to the rule of apportionment. See *Brushaber*, supra, at pages 17-19; and *Pollock v. Farmers Loan & Trust*, 158 U.S. 601, both of which holding that a direct tax on "sources" of income (as opposed to a direct tax on "income" *separated* from those "sources") is unconstitutional unless apportioned. [3] That the "wage tax" provided for in Code Section 3402(a)(1) is indeed a tax separate and distinct tax from the income taxes imposed in Section 1, is confirmed by Code Section 6413(a)(1) which states, in relevant, part that "If more than the correct amount of tax *imposed by Section* 3101, 3111, 3221, ***or 3402*** is paid etc. etc. etc" (emphasis added). Therefore a *separate* and *distinct* "wage tax" is obviously "imposed" in Code Section 3402 – having *nothing* to do with *either* the "income tax" *imposed* in Section 1 of the Code, or the 16th Amendment. This is confirmed by Code Section 3402(d), which states that: "If the employer...fails to deduct and withhold the tax under this chapter, and thereafter the tax *against which such tax may be credited* is paid..." Obviously, *two* taxes are involved here:the wage tax *imposed* in Chapter 24, and (2) the income tax (*imposed* in Chapter 1), which is the tax "against which" the wage tax is to be "credited."

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[3] The descriptive caption over Code Section 3402 "Income tax collected at source" while benign is also incorrect. What this statute *actually* "collects" is a "wage" tax, not an "income" tax.

If this Court sustains the decision of the 9th Circuit that Petitioners are liable to pay a direct tax on their wages (as imposed in Section 3402) which is not imposed on the basis of apportionment, then Petitioners are claiming that the wage tax imposed in 18 U.S.C 3402 is unconstitutional for want of apportionment as held in both the *Pollock* and *Brushaber* decisions. [4]

III. The Ninth Circuit's decision is in conflict with all of the taxing clauses of the Constitution and this Court's holdings in both *Pollock* and *Brushaber*, by permitting the United States to retain funds collected as a federal tax but which were not collected either on the basis of *apportionment* as provided for in Article 1, Sections 2 and 9, Clauses 3 and 4, nor on the basis of *geographic uniformity* as provided for in Article 1, Section 8, Clause 1 of the United States Constitution.As Petitioners pointed out in their appeal to the Ninth Circuit, *Moran v. U.S.*, 63 F.3rd 663 as relied on by the trial court proves that income taxes are being unconstitutionally exacted. Since all *man-*

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[4] The 16th Amendment did not overrule the *Pollack* decision. In *Pollock* the Supreme Court held that a Federal income tax imposed directly on "sources' of income was unconstitutional if not apportioned. The *Brushaber* Court held (on page 18) that "...the command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived, forbids the application to such taxes of the rule applied in the *Pollock* Case by which alone taxes were removed from the great class of excises, duties and imposts *subject to the rule of uniformity* and were placed under the other direct class," subject to the rule of apportionment. In the instant case, the "wage tax" (the tax which applies to the funds at issue) imposed in Code Section 3402 is imposed, without apportionment, directly on a "source" of income, Petitioners' wages, and, as such, it would be in violation of both the *Brushaber* and *Pallack* decisions if its payment were not made refundable upon request, as provided in Sec. 31(a)(1).

datory, federal taxes must be collected either on the basis of *apportionment* or on the basis of *geographic uniformity, Moran* demonstrates that income taxes are collected differently in the Fifth and Eight Circuits from how they are collected in the Second, Third, Fourth, Sixth and Federal Circuits.

This fact is even more dramatically revealed in *Ott v. USA,* 141 F.3rd 1306 (a case relied upon by Nevada District Court Judge Howard D. McKibben in his rejection of a refund suit similar to this one, in *Domingo Montijo et al. v. U.S.*, CV-S-97-01710-HDM (RLH)). ***Ott*** reveals that income taxes are enforced one way in the 5th and 8th Circuits, another way in the Fed. 3rd, 4th and 7th Circuits, and still another way in the 6th, 9th, and 10th Circuits. [5] Thus it is undeniable that income taxes are *not* being collected either on the basis of *geographic uniformity* or on the basis of *apportionment*, and Petitioners ask this Court to take judicial notice of that fact. Obviously, Petitioners have a constitutional right not to be forced to pay a federal tax that is not being collected pursuant to either one constitutional rule or the other. Therefore, if the decision of the 9th Circuit is not reversed and the funds collected are not refunded to Petitioners, then it is Petitioners' claim that the income tax is being collected unconstitutionally – since it is not being collected either on the basis of *apportionment* nor on the basis of *geographic uniformity*. Therefore, it is not being collected pursuant to *any* of the taxing clauses contained in the Constitution.

IV. The Ninth Circuit Court of Appeals' holding that "The Sixteenth Amendment authorizes a direct non-apportioned income tax on resident United

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[5] Apart from everything else, any law that can generate such a divergence of legal opinion (as described in *Ott*) must, obviously, be "void for vagueness," which Petitioners also maintain.

States citizens," is in *direct conflict* with this Court's bed rock ruling in *Brushaber v. Union Pacific RR,* as well as being in conflict with its ruling in *Stanton v. Baltic Mining Co.,* 240 U.S. 103. In *Brushaber* this Court held that the Sixteenth Amendment clarified the nature of the income tax as being an *excise* tax (and not a *direct tax* as claimed by the Ninth Circuit in its instant ruling) , thus correcting this Court's earlier ruling in *Pollock v. Farmers Loan and Trust,* supra, in which this Court held an income tax to be a direct tax, and so declared the Income Tax Act of 1894 unconstitutional for want of apportionment. In *Brushaber* this Court ruled (on pages 16 & 17) that: "the fact that taxation on income was in its nature an *excise* entitled to be enforced as such...that taxes on such income had been sustained as *excise taxes* in the past." (Emphasis added) The fact that the 16th Amendment clarified the nature of an income tax as being an excise tax was further confirmed by this Court in *Stanton v. Baltic Mining Co,* supra, wherein this Court held at page 112:

> "....the provisions of the Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being *taken out of the category of indirect taxation to which it inherently belonged* and being placed in the category of *direct taxation subject to apportionment...*" (Emphasis added)

Therefore the decision of the 9th Circuit which was based on a claim that the 16th Amendment authorized "a *direct* non-apportioned income tax on resident United States citizens," is in *direct conflict* with this Court's holdings in the *Brushaber* and *Stanton* decisions and thus it must be reversed just on this issue alone.

V. The Ninth Circuit's decision is in conflict with Article 1, Section 1, Clause 1 of the United States Constitution and decisions of this Court in holding that federal courts and Petitioners are not subject to the "legislative powers " vested in Congress, but are only bound by such court decisions as the Ninth Circuit deems appropriate to cite. Petitioners ask this Court to take judicial notice that the Ninth Circuit's decision was not based on any statute or decisions of this Court, but it was based solely on three, lower court decisions that are obviously in conflict with the Constitution, decisions of this Court, and numerous statutes contained in 26 U.S.C. In addition, Petitioners ask this Court to take judicial notice of the fact that Congress never passed a law binding the public to court decisions in which they took no part.[6] Indeed, in Code Sections 6001 and 6011 Congress notified the public that it must comply with "regulations. " Congress has never passed a law notifying the public that it must "comply" with court decisions involving litigation in which they took no part. Therefore, in seeking to enforce against Petitioners not stat utes passed by Congress, nor even Treasury Department regulations, but only court decisions,[7] the 9th Circuit is in conflict with Article 1, Section 1, Clause 1 of the United States Constitution; because it seeks to enforce, as law, court decisions as if they are the equivalent of laws passed by Congress; which, by implication, would mean that courts have "legislative

[6] Indeed, how can the public be bound by litigation and court decisions in which they took no part? The public is only bound by statutes and Treasury Regulations promulgated in pursuance thereof, while the courts are primarily bound by statutes and the Constitution; principles that the 9th Circuit and the U.S. Department of Justice seem unaware of.

[7] Not only are the three court decisions cited in the 9th Circuit decision irrelevant as a matter of law, they are not even congruent to either the facts or the statutes involved in the instant litigation. None of them are related to the wage taxes at issue.

powers." Such a claim by the 9th Circuit, *which is inherent in its instant decision*, is in conflict with the holding of this Court in *Osborn et al v. The Bank of U.S.*, 6 L.Ed 204, [8] and is blatantly unconstitutional on its face.

VI. The Ninth Circuit's holding that "Compensation for labor services, paid in the form of wages or salary, is income subject to taxation" is in conflict with 26 U.S.C. 61 and numerous decisions of this Court, such as: *Brushaber v. Union Pacific RR*, supra and *Merchants Loan & Trust Co. v. Smietanka*, 255 U.S. 509, as well as *Doyle v. Mitchell*, 247 U.S. 179, *Burnet v. Harnel*, 287 U.S. 103, and *Bowers v. Kerbaugh-Empire Company*, 271 U.S. 887.

While the alleged amount of Petitioners 1996 "income" was not an issue before the trial court[9], the Ninth Circuit's claim regarding this issue it so inaccurate that it must be addressed, since it reveals the Ninth Circuit's total lack of understanding concerning the Federal income tax, which produced the to

[8] In *Osborn*, Chief Justice, John Marshall wrote: " Judicial power, as contradistinguished from the power of the laws *has no existence*. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise discretion, it is a mere legal discretion, a discretion to be exercised *in discerning the course prescribed by law*, and, when that is discerned, *it is the duty of the court to follow it*. Judicial power is never exercised for the purpose of giving the effect to the will of the judge, always for the purpose of giving effect *to the will of the legislature;* or, in other words, the *will of the law*. (emphasis added). And where is "the law" cited in the 9th Circuit's decision?

[9] If the Government wanted to challenge the amount reported as "income" by Petitioners on their 1996 income tax return, they should have brought a court action pursuant to 26 U.S.C. 6501(c)(1)). Since the Government did not choose to do so, the opinions of U.S. attorneys and federal judges concerning Petitioners' alleged 1996 "income" are irrelevant and immaterial to this lawsuit.

tally erroneous Ruling for which a Writ of Certiorari is sought.

It is clear that when Congress passed the 16th Amendment, it believed it had acquired a new taxing power – the power to impose a direct tax on "sources" of "income" without apportionment. Congress also believed that the Amendment relieved it of the limitations imposed upon it by the *Pollock* decision. Therefore, in the Income Tax Act of 1913, Congress imposed the income tax *directly* on "sources" of income and not on "income" separated from those "sources"[10] For example, Section B of the Income Tax Act of 1913 stated that "net income ...shall include...salaries, wages or compensation for personal service..." Similarly, the 1939 Code stated (in Section 22) that "'Gross income' includes...salaries, wages, or compensation for personal service..." Note that neither in the Act of 1913 or in the 1939 Code did the law attempt to "define" "Gross income" Obviously, prior to the 1954 Code the income tax was not being collected in conformity with the Constitution as expressed in the *Brushaber, Merchants Loan and Trust Co.*, and *Stanton* decisions, since it was not being collected (a) as the excise tax

[10] Petitioners ask this Court to take judicial notice that this Court held in the *Brushaber* decision (at page 17) that, "The whole purpose of the (Sixteenth) Amendment was to relieve all income taxes when imposed from apportionment from a *consideration of the source* whence the income was derived." (Emphasis added) Therefore a tax on wages is a tax in which the "source" is *considered*– as opposed to a tax on corporate profits where the "sources" that produced the profit are not "considered." Which is why only a corporate profit can fall within the meaning of "income" as used in the 16th Amendment, as explained by the above quote from *Brushaber*. Along these lines, it should be noted that Section 61 does not define "income" one way for corporations and another way for individuals. So whatever "income" means with respect to corporations must also apply to individuals. And since corporations have no taxable income unless they have a profit, this principle must apply to the Petitioners as well.

this Court held it to be, nor (b) was it being collected on "income" *separated* from its source – i.e on corporate profits only.[11]

Therefore, Congress, in the 1954 Code, sought to bring the income tax laws into *conformity* with prior decisions of this Court. To do that, Congress had to change the meaning of "income" so only "corporate profits" would fall within that meaning. In doing that, it had to "define" Gross income (which it had never done before) so that only corporate profit would fall within that definition. In addition, since Congress could not figure out how to impose an income tax as the excise tax the Supreme Court ruled it to be (and since the Government could not *legally* collect income taxes as a direct tax without apportionment), Congress had *to remove all mandatory provisions from the law*, so the 1954 Code *would not be unconstitutional* on this ground. With the changes incorporated in the 1954 Code, the payment of income taxes now became based on "voluntary compliance". [12] Congress changed the meaning of income by removing from Section 61 of the 1954 Code references to "wages," "salary" and compensation for "personal services" as they had appeared in Section 22 of the 1939 Code and in earlier taxing statutes.[13]

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[11] As this court held in *Merchants Loan and Trust v. Smietanka*, "income" as used in the Tax Act of 1913 means the same thing as "income" meant in the Corporate Excise Tax Act of 1909. This meaning was affirmed by this Court in the *Burnet* and *Bowers* decisions as cited above. In *Doyle v.Mitchell*, supra, this Court stated (on page 189) that: "income" conveys "the idea of gain or increase *arising from corporate activities*." (Emphasis added)

[12] It did this by substituting such mandatory language as "There shall be levied, collected, and paid ..." that appeared in Section 11 of the 1939 Code, for the benign provision that a tax on income was merely "imposed"; while making sure that nowhere in the 1954 Code was anyone made "liable" for, or required "to pay" the tax "imposed" in Section 1. In addition, the 1954 Code also removed all references to the IRS and the Commissioner as

Congress now worded Section 61 in such a way that only a corporate profit could fall within its "definition."[14] Whereas in Code Section 22 of the 1939 Code, "salaries", "wages" and compensation for "personal services" were identified as being taxable as "income," nothing in Code Section 61 of the 1954 Code even mentions "wages," "salary," or compensation for "personal service."[15] And since such items were specifically *included* in Code Section 22 and specifically *excluded* from Code Section 61 of the 1954 Code, it is clear that Congress – by their removal – did not intend that wages, salary, or compensation for *personal service* should be taxable as "income."[16] And courts are clearly without authority (as the Ninth Circuit has done here) to put words and items into the

they had appeared in the 1939 Code, and substituted instead the Secretary of the Treasury or his delegate. However, since the Secretary of the Treasury has never delegated any enforcement power to the IRS (to insure that, under the law at least, income taxes would not be collected unconstitutionally) the payment of income taxes now became *"voluntary."* However it is clear that somebody forgot to point out these changes to the U.S. Department of Justice and to the Ninth Circuit panel who rendered the decision from which Petitioners now appeal.

[13] Both the Senate and the House accomplished the change in the meaning of income without fanfare by stating that the new definition of gross income "is based upon the sixteenth amendment and the word 'income' is used . . . *in its constitutional sense.*" (Emphasis added) See, Senate Report No. 1622, 83rd Cong. 2nd Sess. 168 (1954), U.S. Code Cong. & Admin. News 1954, p. 4802 and House Report No 1337, 83rd Cong., 2nd Sess. A 18. See also *Conner v. U.S.*, 303 F. Supp 1187, p.1190, n.5) So "income" in Section 61 is not used in its *ordinary* sense (as some federal judges still maintain) but in its "*constitutional* sense." And in its "constitutional sense" "income" means "corporate profit."

[14] Though Code Section 61 is entitled "Gross income defined," "gross income" is not defined in this Code Section, because Section 61 attempts to define "gross income" by using the word "income" itself in that alleged "definition"; however, a word can not be "defined" by itself. Besides, Congress has no authority to define "income" as explained in *Eisner v. Macomber*, 252 U.S. 189 at page 206.

law where no such wording exists. What the Ninth Circuit is attempting to do here is to enforce as "law" the repealed provisions of Section 22 of the 1939 Code, in lieu of enforcing the law as contained in Section 61 of the current law. The Supreme Court should not sanction such action by the Ninth Circuit by allowing such a ruling to stand.

VII. Petitioners also wish to invoke the 6th Amendment to the United States Constitution, which provides for "the Assistance of counsel." Since Irwin Schiff of Las Vegas, Nevada was instrumental in fashioning the arguments that went into this Petition for a Writ of Certiorari, Petitioners request that this Honorable Court allow him to represent them at oral argument.

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[15] Section 61 does provide that "compensation for services" can fall within the meaning of income, because corporations can receive "compensation for services," but since corporations cannot receive compensation for "personal services" this reference was removed.

[16] Further proof that Congress deliberately excluded wages and salary from being taxable as "income" to persons living in the U.S., is that in legislating what constitutes "income" to Americans living abroad and to non resident aliens (those living in areas where the U.S. Constitution is not applicable), Congress, in Code Sections 911 and 871, specifically listed "salaries" and "wages" as being taxable to such persons, while making sure that such references were omitted from Code Section 61.

CONCLUSION

If the Supreme Court allows the Ninth Circuit ruling of October 26, 1999 to stand, it will have sanctioned the proposition that the United States Constitution does not bind federal courts, statutes passed by Congress, nor prior decisions of this Court.

Respectfully submitted,

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